

Erica J. Spurlock, Bar #032443  
JONES, SKELTON & HOCHULI P.L.C.  
40 N. Central Avenue, Suite 2700  
Phoenix, Arizona 85004  
Telephone: (602) 263-7304  
Fax: (602) 200-7884  
espurlock@jshfirm.com

Attorneys for Defendants Fitness  
International, LLC dba Esporta Fitness,  
Janalee Thies and Mimi Oganessian

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

Reginald Sanders,

Plaintiff,

v.

Fitness International, LLC dba Esporta  
Fitness, Mimi Oganessian, General  
Manager, Jena [sic] Thies, Operations  
Manager,

Defendants.

No. CV-23-cv-00481-MTL

**DEFENDANTS FITNESS  
INTERNATIONAL, LLC, THIES  
AND OGANESSIAN'S MOTION TO  
DISMISS PLAINTIFF'S 2ND  
AMENDED COMPLAINT FOR A  
CIVIL CASE**

Defendants Fitness International, LLC dba Esporta Fitness, Janalee Thies and Mimi Oganessian (hereinafter collectively "Defendants") move to dismiss all claims asserted against them by Plaintiff's Second Amended Complaint for a Civil Case for failure to state a claim upon which relief can be granted. This Motion is based on the following Memorandum of Points and Authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

In his Second Amended Complaint, Plaintiff alleges three causes of action: (1) Public Accommodation Discrimination Based on Sex, (2) negligence, and (3) retaliation. *See* Pl.'s Second Am. Compl. (Docket No. 7) 3, 9-15. His public accommodations claim is premised on his claim that he was "subjected to discrimination based on his sex or gender" by employees of the Defendant because they did not trespass

his ex-girlfriend following a domestic dispute on Defendants property. Pl.'s Second Am. Compl. 10:25. Additionally, he claims Defendants discriminated against him because they refused to violate Defendant's company policy by providing surveillance video directly to Plaintiff of his domestic dispute. His negligence and retaliation claims are based on the same factual allegations. Additionally, he claims that Defendants were unprofessional, harassed him, and created a toxic environment when in fact even taking all the allegations in Plaintiff's Complaint as true, at most he was subject to an unprofessional environment in Defendant's fitness facility, not discrimination. Plaintiff was never denied service at any of Defendant's fitness facility locations, nor does Plaintiff allege as much in his Complaint. Indeed, he has continued to visit Defendants' facilities as recently as this month.

## **II. LEGAL ANALYSIS**

### **A. Public Accommodations (Discrimination Based on Sex)**

Under Title II of the Civil Rights Act of 1964, "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(b). The Arizona Civil Rights act is essentially the same. A.R.S. § 41-1442(A) ("Discrimination in places of public accommodation against any person because of race, color, religion, sex, national origin or ancestry is contrary to the policy of this state and shall be deemed unlawful."); A.R.S. § 41-1442(B) ("No person, directly or indirectly, shall refuse to, withhold from or deny to any person, nor aid in or incite the refusal to deny or withhold, accommodations, advantages, facilities or privileges thereof because of race, color, religion, sex, national origin or ancestry, nor shall distinction be made with respect to any person based on race, color, religion, sex, national origin or ancestry in connection with the price or quality of any item, goods or services offered by or at any place of public accommodation."). And in construing other sections of the Arizona Civil Rights Act that mirror the Civil Rights Act of 1964, "Arizona courts have found the federal courts' construction of the federal statute persuasive." *York v. JPMorgan*

1 *Chase Bank, National Association*, Case No. CV-18-04039-PHX-SPL, 2019 WL 3802535,  
2 at \*5 (D. Ariz. Aug. 13, 2019).

3           With only circumstantial evidence of discrimination, Title II claims are  
4 analyzed under the same *McDonnell-Douglas* burden-shifting framework as Title VII  
5 claims. *See, e.g., Feacher v. Intercontinental Hotels Group*, 563 F. Supp. 2d 389, 402  
6 (N.D.N.Y. 2008). Under this framework, the claimant must show that (1) he is a member  
7 of a protected class, (2) he attempted to contract for certain services, (3) he was denied the  
8 right to contract for those services, and (4) those services remained available to similarly-  
9 situated individuals outside of the claimant's protected class. *York v. JPMorgan Chase*  
10 *Bank, National Association*, Case No. CV-18-04039-PHX-SPL, 2019 WL 3802535, at \*2  
11 (D. Ariz. Aug. 13, 2019). In addition to this, though, the claimant must plausibly show that  
12 the discrimination was intentional. *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989).

13           Here, Plaintiff cannot establish a *prima facie* case of sex discrimination. First  
14 and foremost, and even according to Plaintiff's Complaint, he was simply never denied the  
15 right to use or utilize Defendants fitness facilities, equipment, or accompanying services.  
16 Nor was his membership revoked or terminated. Plaintiff was and to this day remains a  
17 member of Defendant's fitness facilities. Plaintiff utilized, and upon information and  
18 belief, still utilizes Defendant's fitness facilities, the equipment, and the amenities like all  
19 other members. Additionally, even taking all of Plaintiff's allegations in his Complaint as  
20 true, there is no indication that Plaintiff was discriminated against upon the basis of his sex.  
21 As a result, Plaintiff cannot establish a *prima facie* case, so his claim fails.

22           More importantly, though, even under Plaintiff's version of events, he was  
23 not subject to sex or gender discrimination under the Arizona Civil Rights Act. Under  
24 Plaintiff's telling, he was: (1) subjected to "offensive" comments by Defendants Thies  
25 when she stated "[w]hat did you do to her? She seems like a pleasant young lady." Pl.'s  
26 Second Am. Compl. 10:8-9. Defendant Thies' remarks are not rude, harassing, or  
27 inappropriate, and this does not as Plaintiff claims, express any bias or discrimination  
28 against Plaintiff based on his sex or gender, implicitly or explicitly. Even taken as true,

1 Defendant Thies is discussing Plaintiff and his relationship with his ex-girlfriend, which  
2 she was exposed to from reviewing the surveillance footage that he requested. She was not  
3 opining on Plaintiff's behavior solely because of his sex. Plaintiff also points to Defendant  
4 Oganessian's statement: "[d]o you think I owe you something? You told me you were dating  
5 a married woman, right? And that's why she's "harassing you?[""] To be honest, I feel that  
6 maybe she may have come there to ask you to leave her alone." Pl.'s Second Am. Compl.  
7 10:14-17. Despite Plaintiff's assertion otherwise, Defendant Oganessian was not exhibiting  
8 implicit bias with this statement, let alone explicit. Defendant Oganessian was not basing  
9 this statement on Plaintiff's sex, but her viewing of the surveillance footage. Footage she  
10 only reviewed because Plaintiff requested as much.

11           Even taking all the allegations in Plaintiff's Complaint as true, these  
12 statements do not constitute discrimination under Title II of the Civil Rights Act or the  
13 Arizona Civil Rights Act. At no point was Plaintiff ever denied service; at most, he received  
14 mere comments on surveillance video that he requested the Defendants to provide him.  
15 This is not enough to constitute denial of service. *See, e.g., Lopez v. Target Corp.*, 676 F.3d  
16 1230, 1231-32 (11<sup>th</sup> Cir. 2012) (a white cashier telling a Hispanic person that the checkout  
17 line was closed to him while making rude comments and gestures was not sufficient to  
18 establish denial of service). It further is not sufficient enough to show intentional  
19 discrimination based on sex. Even accepting Plaintiff's version of events in the worst  
20 possible context, what he alleges is no more than poor, inattentive service, and an  
21 unwillingness to violate Defendant's company policy, not actionable discrimination under  
22 either Title II of the Civil Rights Act or the Arizona Civil Rights Act. As a result, Plaintiff  
23 cannot make a *prima facie* case of discrimination even as alleged.

24           Here, based on Plaintiff's Complaint, the most that he can allege is that his  
25 ex-girlfriend was not trespassed when he requested, he was not directly provided the  
26 surveillance video in question (which again would have violated Defendant Fitness  
27 International's company policy), and that he was subject to comments regarding his  
28 domestic dispute. None of the reasons for any of these events occurring happened because

of Plaintiff's sex but were instead based on Defendant Fitness International's policy regarding providing surveillance video only directly to the police, and Defendants Oganessian and Thies' review of the surveillance footage and repeated interactions with Plaintiff. None of these even approaches what could be considered a denial of service. As a result, Plaintiff's sex discrimination claim fails.

## **B. Negligence**

To maintain an action for negligence, a plaintiff must prove that the defendant owed a duty of care to the plaintiff, a breach of that duty, actual and proximate causal connection between defendant's conduct and plaintiff's injury, and actual damage. *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007). A court deciding a 12(b)(6) motion to dismiss should look only to the factual allegations contained within the complaint. *Orca Communications Unlimited, LLC v. Noder*, 236 Ariz. 180, 181, 337 P.3d 545, 546 (2014).

Plaintiff simply has not made an appropriate negligence claim. Plaintiff's Complaint alleges that Defendants were negligent for failing to prevent the trespass of Plaintiff's ex-girlfriend. Plaintiff even goes as far as to claim "[the] ex-girlfriend is *no different than an active shooter*." Pl.'s Second Am. Compl. 11:12 (emphasis added). Plaintiff cites A.R.S. §§ 12-2505-06 for the purpose of establishing liability for injuries resulting from negligence. A.R.S. §§ 12-2505-06. Plaintiff mistakenly cites inapplicable codes from the City of Phoenix in his Complaint, stating they pertain to premises liability and property owner's duty of care, but instead cites codes that are titled, "[a]ssault and battery—Prohibited; permissible violence; degree of force permitted," and "[d]isturbing the peace," respectively. PHOENIX, ARIZ., CITY CODE, § 23-2, 3 (2023). In addition, Plaintiff cites Phoenix City Code § 23-11, titled "Nuisances." PHOENIX, ARIZ., CITY CODE, § 23-11 (2023). While Plaintiff is correct in stating that Defendants have a duty to maintain safe premises for their paying members, Plaintiff states no actionable injury that occurred from this incident. Plaintiff's Complaint indicates that he suffered **no physical or emotional injury** resulting from Defendants' alleged failures. In addition, Plaintiff in no

1 way alleges within his Complaint that Defendants assaulted him, breached the peace, or  
 2 constituted a nuisance. Nor could any close reading of Plaintiff's Complaint be found to  
 3 allege such actions, either within the normally accepted meaning of the words or using  
 4 statutory construction. To the degree that *any* injury may be found within Plaintiff's  
 5 Complaint from this incident, none are actionable injuries under Arizona law.

6 Second, Defendants are under no duty to provide surveillance footage from  
 7 their system directly to Plaintiff simply because he desires to obtain the footage. Plaintiff  
 8 states a duty not reported anywhere in law, and even if somehow such a duty was breached,  
 9 there is no actionable injury to Plaintiff. Defendants have no duty to assist Plaintiff in his  
 10 personal suit absent subpoena or police involvement, neither of which was attempted, and  
 11 Plaintiff only desired to obtain the surveillance footage in direct violation of Defendant  
 12 Fitness International's company policy. Defendants Oganessian and Thies refusal to violate  
 13 company policy is not an actionable injury under Arizona law.

#### 14 C. Retaliation

15 Plaintiff alleges within his complaint that A.R.S. § 41-1442, Phoenix City  
 16 Code § 18-4(B)(2), and 42 U.S.C. § 2000(a-2) prohibit retaliation for discrimination in  
 17 public accommodations. While Plaintiff is correct in his recitation of law, as covered in  
 18 subsection II A above, since Plaintiff was not denied service by Defendants at any of their  
 19 locations, Plaintiff was not discriminated against based on his sex or gender. Since Plaintiff  
 20 was not discriminated against by Defendants, Plaintiff's retaliation charge must fail as a  
 21 function of law.

### 22 III. CONCLUSION

23 Plaintiff's discrimination claim fails both factually and legally. It fails  
 24 factually because even assuming, *ad arguendo*, that Plaintiff was discriminated against, his  
 25 treatment was not based on his sex or gender, but his actions and encounters with  
 26 Defendants, and their view of him after the domestic dispute. Being in or recovering from  
 27 a turbulent personal relationship is not a protected class. It also fails legally because, even  
 28 if accepted as true, Plaintiff's story does not support a claim under Title II of the Civil

1 Rights Act or the Arizona Civil Rights Act. Plaintiff's Complaint similarly does not allege  
2 any actionable cause of negligence or retaliation, and so must also be dismissed.

3 For these reasons, Defendants respectfully request that Plaintiff's Second  
4 Amended Complaint for a Civil Case be dismissed.

5 DATED this 23<sup>rd</sup> day of October, 2023.

6 JONES, SKELTON & HOCHULI, P.L.C.

7  
8 By 

9 Erica J. Spurrlock  
10 40 N. Central Avenue, Suite 2700  
11 Phoenix, Arizona 85004  
12 Attorneys for Defendants Fitness  
International, LLC dba Esporta Fitness,  
Janalee Thies and Mimi Oganessian

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on this 23<sup>rd</sup> day of October, 2023, I caused the foregoing  
15 document to be filed electronically with the Clerk of Court through the CM/ECF System  
16 for filing; and served on Plaintiff via the Court's CM/ECF system as well as via U.S. Postal  
17 Service.

18 Reginal Sanders  
914 E. Broadway Rd., #1171  
19 Tempe AZ 85282  
reggiedsanders@gmail.com

20  
21 /s/ Wendy Mungai  
22  
23  
24  
25  
26  
27  
28